

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALPHONZO LEON WRIGHT,

Defendant-Appellant.

UNPUBLISHED
September 11, 2007

No. 256475
Genesee Circuit Court
LC No. 03-012650-FH

ON REMAND

Before: Whitbeck, C.J., and Saad and O’Connell, JJ.

PER CURIAM.

Defendant Alphonzo Leon Wright appeals as of right his jury trial convictions for possession with the intent to deliver between 50 and 450 grams of cocaine,¹ and maintaining a drug vehicle.² In our prior opinion, we affirmed Wright’s possession with the intent to deliver conviction but reversed Wright’s maintaining a drug vehicle conviction on the ground that there was insufficient evidence to support the conviction under this Court’s interpretation of MCL 333.7405(1)(d), as set forth in *People v Griffin*.^{3, 4} The Michigan Supreme Court vacated our prior opinion and remanded the case for us to reconsider the sufficiency argument in light of the new interpretation of MCL 333.7405(1)(d) established in *People v Thompson*,⁵ and further instructed us to do so without reference to the disavowed “no inference upon inference” rule.⁶ On remand, we again affirm in part and reverse in part.

I. Basic Facts And Procedural History

The facts and procedural history were adequately set forth in our previous opinion; thus, we reproduce those facts here:

¹ MCL 333.7401(2)(a)(iii).

² MCL 333.7405(1)(d).

³ *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

⁴ *People v Wright*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2005 (Docket No. 256475) (Wright I).

⁵ *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007), overruling *Griffin*, *supra*.

⁶ *People v Wright*, 477 Mich 1121; 730 NW2d 720 (2007) (*Wright II*).

On May 22, 2003, Officer Rogelio Villarreal testified that he surveilled 130 Odette St. in order to execute a warrant.⁴ Officer Villarreal was looking for a gray Cadillac. After approximately 40 minutes, Officer Villarreal saw a gray Cadillac drive up to 130 Odette St. Wright exited the car and walked up to the house. Wright then returned to the car and drove away from the house. Officer Villarreal notified the other officers about the Cadillac's departure. Officer Randy Tolbert followed Officer Villarreal's directions and met up with the Cadillac approximately three blocks away. Officer Tolbert followed the Cadillac in his unmarked car while it made numerous turns throughout Flint. At one point, the Cadillac began to drive at an accelerated rate. The Cadillac continued driving at an accelerated rate through a housing complex and down a few more streets until it reached an intersection that Officer Lee Kahan was blocking. The Cadillac swerved around Officer Kahan's marked police car and continued speeding down several more streets, nearly hitting another vehicle. When the Cadillac finally stopped, Wright exited the vehicle and started running.

⁴ During argument on defendant's motion *in limine*, both the defense and prosecution referenced the fact that the defendant was originally wanted for a homicide investigation, and the warrant police were executing was an arrest warrant issued for defendant because of his suspected involvement with a homicide. However, Villarreal did not specify what type of warrant the police were executing while testifying.

Officer Tolbert chased Wright on foot. He chased Wright onto a front porch, where Wright reached into the front of his pants, grabbed a clear bag containing 125 grams of cocaine, and threw the bag onto the porch. When Officer Tolbert realized that Wright was not reaching for a weapon, he took Wright into custody. Officer Tolbert collected the bag of cocaine from the porch. He also found and collected a digital scale on the ground in front of the Cadillac and a cellular phone plugged into the cigarette lighter outlet.

In his statement taken by agents from the Bureau of Alcohol, Tobacco, and Firearms (ATF), Wright explained that he ran from the police because he "was dirty." According to ATF Special Agent Todd Bowden, the term "dirty" is a common street term for an individual who is in possession of or caught with an item that they are not supposed to have, such as cocaine. Wright admitted that the cocaine was his.

Sergeant Mark Blough was qualified as an expert in the area of sale and distribution of cocaine in the vicinity of Flint. He testified that, based on the quantity of cocaine Wright possessed, the scale, the fact that Wright had over \$ 100 in cash on him, and the lack of personal use paraphernalia, Wright possessed the cocaine with the intent to deliver it.

Wright filed a motion *in limine* with the trial court to exclude a three-hour video recorded interview, primarily regarding Wright's participation in a homicide. The interview took place after Wright was arrested for the instant charge but focused primarily on his involvement in a homicide. The trial court

precluded the use of the videotape with respect to any matters other than this case. Defense counsel and the trial court endorsed the prosecution's offer to have Special Agent Bowden testify to Wright's admission to possession of cocaine in lieu of playing the videotape.

To explain how he became involved in the incident, Officer Kahan stated, "I heard one of the 800 cars puttin' [sic] out a chase or they were following a vehicle that had a potential homicide suspect in it." Out of the presence of the jury, defense counsel argued that Officer Kahan's reference to Wright as a homicide suspect was unduly prejudicial and violated the court's ruling on his motion *in limine*. Defense counsel then asked the trial court to declare a mistrial. The trial court ruled:

Clearly, any reference to an alleged homicide or the [Wright] being a suspect is not relevant. However, the context of all the other testimony in this case, one reference to a homicide suspect with . . . nothing more, no further evidence, no further mentioning by either a witness or the prosecutor, seems to be-to weigh against granting a motion for a mistrial. I don't find it to be unduly prejudicial, but I am offering to give a curative instruction.

Defense counsel then renewed her motion for a mistrial, which the trial court denied. The trial court gave the following curative instruction to the jury: "You are instructed to disregard any reference to an alleged homicide that you may have heard. It is totally irrelevant to any issues in this trial."

The jury convicted Wright for possession with the intent to deliver between 50 and 450 grams of cocaine and maintaining a drug vehicle.^[7]

On appeal, Wright argued that the prosecution did not present sufficient evidence to support his conviction for maintaining a drug vehicle because there was no evidence that he used the vehicle for the purpose of selling or keeping drugs. We agreed with Wright. In *Wright I*, we found that although evidence presented at trial was sufficient to show that Wright controlled the vehicle in which he was observed, it did not show that he controlled the car for the purpose of keeping or selling drugs and it did not show he did so continuously for an appreciable period of time.⁸ We noted that our review of relevant case law revealed that where a defendant had been convicted for maintaining a drug vehicle or a drug house there had been evidence of a drug sales transaction or the police discovered clear evidence that drugs were being stored in the subject location.⁹ Thus, we found it significant that police neither observed Wright selling drugs out of

⁷ *Wright I*, *supra* at slip op pp 1-3.

⁸ *Id.* at slip op p 4.

⁹ *Id.* at slip op p 4 n 12.

his car nor found any drugs in the car after he was arrested.¹⁰ Because only two inferences could be drawn from the evidence—(1) that one occasion he possessed cocaine while he was in that vehicle; and (2) that one occasion he possessed a scale in the car—we stated that “[i]t would require piling inference upon inference to conclude that Wright had used that vehicle for an appreciable period of time for the purpose of keeping or selling proscribed drugs.”¹¹

II. Sufficiency Of The Evidence; Drug Vehicle

A. Standard Of Review

“Taking the evidence in the light most favorable to the prosecution, the question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.”¹²

B. Maintaining A Drug Vehicle

MCL 333.7405(1)(d) provides, in pertinent part, that a person “[s]hall not knowingly keep or maintain a . . . vehicle . . . that is used for keeping or selling controlled substances in violation of this article.” In *Griffin* this Court held that, to convict a defendant of keeping or maintaining a drug house, the defendant need only “exercise authority or control over the property for purposes of making it available for keeping or selling proscribed drugs and to do so *continuously for an appreciable period*.”¹³ However, in *Thompson*, the Supreme Court overruled *Griffin* and held that “while [MCL 333.7405(1)(d)] precludes a conviction for an isolated incident without other evidence of continuity, the statute does not require the prosecution to show that a defendant’s actions occurred ‘continuously for an appreciable period.’”¹⁴

Here, viewing the evidence in a light most favorable to the prosecution, it only established that, on one occasion, Wright possessed cocaine and a scale while he was in the subject vehicle. In *Thompson*, the Court specifically clarified,

[O]ne does not keep or maintain a drug vehicle by engaging in an isolated act

The phrase “keep or maintain” implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence, such as perhaps a secret compartment or the like, that conduces to the same conclusion.

¹⁰ *Id.* at slip op p 4.

¹¹ *Id.*

¹² *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002).

¹³ *Griffin*, *supra* at 32 (emphasis added), overruled in *Thompson*, *supra* at 148.

¹⁴ *Thompson*, *supra* at 148.

* * *

Hence, if the evidence only shows that defendant used a vehicle to keep or deliver drugs on one occasion, and there is no other evidence of continuity, the evidence is insufficient to establish that defendant kept or maintained a drug vehicle in violation of MCL 333.7405(1)(d).^[15]

We reiterate that the police neither observed Wright selling drugs out of his car nor found any drugs in the car after he was arrested. Thus, there was no evidence, circumstantial or otherwise, that Wright had ever kept drugs in the car or sold drugs from the car on any other occasion. Accordingly, even applying the new interpretation of MCL 333.7405(1)(d) as set forth in *Thompson*, we continue to hold that there was insufficient evidence to support the drug vehicle conviction, and we again reverse Wright's conviction on that charge.

Although it vacated our entire prior judgment, the Supreme Court only addressed our application of MCL 333.7405(1)(d) to Wright's drug vehicle conviction. We thus conclude that the Court found no error with our resolution of Wright's challenge to the trial court's denial of his motion for mistrial. Accordingly, we incorporate and adopt the analysis and resolution of that issue as set forth in *Wright I*, in which we concluded that there was nothing to suggest that the prosecutor knew in advance that the officer would give unresponsive testimony or that the prosecutor encouraged the officer's statement in which he indicated that Wright was a homicide suspect.¹⁶ We therefore held that the trial court properly denied Wright's motion for a mistrial where the statement's admission did not impair Wright's ability to receive a fair trial, the trial court gave the jury an appropriate curative instruction, and sufficient evidence was presented through the police officers' testimony to support Wright's conviction of possession with intent to deliver cocaine.¹⁷

We affirm in part and reverse in part.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Peter D. O'Connell

¹⁵ *Id.* at 155-158.

¹⁶ *Wright I*, *supra* at slip op p 3.

¹⁷ *Id.*